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IN THE

SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL ASSOCIATION FOR THE SCIENTIFIC STUDY OF INTELLECTUAL DISABILITIES, *et al.* IN SUPPORT OF PETITIONER

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– AMICI CURIAE –

The International Association for the Scientific Study of Intellectual Disabilities (IASSID)

The Australian Association for the Scientific Study of Intellectual Disabilities (ASSID)

The Canadian Association for Community Living (CACL)

The British Institute of Learning Disabilities (BILD)

The Bundesvereinigung Lebenshilfe

The Cristos Stelios Foundation

The Community of Sant'egidio

European Academy of Childhood Disability (EACD)

IHC New Zealand, Inc.

Inclusion International

MENCAP: The Royal Society for Mentally Handicapped Children and Adults

P.O.S.G.A.M.E.A.

The National Association for the Mentally Handicapped of Ireland (NAMHI)

SAMS: Standards & Monitoring Services Trust

The Society of Homes for the Handicapped

Special Olympics, Inc.

The Swedish National Association for People with Mental Handicap, FUB

TASH

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TABLE OF AUTHORITIES

CASES

Andrews v. *Collins*, 21 F.3d 612 (5th Cir. 1994) 12

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Lowenfield v. *Phelps*, 484 U.S. 231, 244 (1988) 9

Miller v. *Johnson*, 200 F.3d 274 (5th Cir. 2000) 1

Monroe v. *United States*, 463 F.2d 1032 (5th Cir. 1972) . . . 7

Penry v. *Lynaugh*, 492 U.S. 302 (1989) . . . . . *passim*

Reck v. *Pate*, 367 U.S. 433 (1961) 7

Sims v. *Georgia*, 389 U.S. 404 (1967) 7

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State v. *Ives*, 648 A.2d 129 (Vt. 1994) 7

State v. *Moore*, 364 S.E.2d 648 (1988) 7

The Paquete Habana, 175 U.S. 677 (1900) 17

Thompson v. *Oklahoma*, 487 U.S. 815 (1988) 14, 17

Trop v. *Dulles*, 356 U.S. 86 (1958) 13

Weems v. *United States*, 217 U.S. 349 (1910) 11

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 9

Yeatts v. *Commonwealth*, 410 S.E.2d 254 (1991) 7

Zant v. *Stephens*, 462 U.S. 862, 877 (1983) 9

FEDERAL STATUTES

Federal Anti-Drug Abuse Act of 1988, Pub.L. 100-690, §7001(l), 102 Stat. 4390, 21 U.S.C. §848(l) (1988 ed.). . . 14

Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 3596(c)(1994) 14

STATE STATUTES

Ark. Code Ann. §§ 5-4-618(b) (1999) 14

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Ind. Code Ann. §§ 35-36-9-6 (West 2001) 14

Kan. Stat. Ann. §§ 21-4623 (d) (1999). 14

Ky. Rev. Stat. Ann. §§ 532.140 (Michie 1990) 14

Md. Code Ann. Art. 27, §§ 412(g)(1) (Bender 2000) 14

Neb. Rev. Stat. §§28-105.01(2) (2000) 14

N.M. Stat. Ann. §§ 31-20A-2.1(B) (Bender 2000) 14

N.Y. Crim. Proc. Law §§ 400.27(12) (West 2000) 14

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Tenn. Code Ann. §§ 39-13-203(a) (1999) 14

Wash. Rev. Code Ann. §§ 10.95.030 (West 2000) 14

INTERNATIONAL SOURCES

TREATIES

African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3/rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4. 24

American Convention on Human Rights 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1, art. 4, 1969. 24

International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, U.N. Doc. A/6316 (1966), Article 6 and 7. 24-26

United Nation Treaty Collection, on Internet at <http://untreaty.un.org.> (visited January 5, 2001) 25

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND OTHER SOURCES

United Nations General Assembly, Declaration on Rights of Mentally Retarded Persons, General Assembly Resolution 2856 (XXVI), UN Doc. A/8429 (1971). 20

United Nations General Assembly, Human Rights in the Administration of Justice, G.A. Res. 39/118, UN Doc. A/RES/39/118, 14 December 1984. 20

Draft Resolution VII, in Report of the Committee on Crime Prevention and Control on its Eighth Session, U.N. ESCOR, 8th Session., Supp. No. 6, at 19, UN Doc. E/AC.57/1984/18(1984). 20

Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, UN Doc. E/CN.15/1996/19 (1996) paragraph 74 18

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1984/50, U.N. ESCOR, Supp. No. 1, at 33, UN Doc. E/1984/92 (1984). 20

Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res.1989/64, U.N. ESCOR, 1989, Supp. No. 1, UN Doc. E/1989/91 (1989). 21

Organization on Security and Co-operation in Europe, Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, 5 June - 29 July, 1990. Article 17.3 26

U.N. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or , UN Doc. E/CN.4/1992/30 (1992) 22

U.N. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1993/46 (1993) 22

U.N. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc.E/CN.4/1994/7 (1994) 22

U.N. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc.E/CN.4/1995/61 (1995) 22

Human Rights Committee, Summary Record of the 1405th meeting: The United States of America, CCPR/C/SR.1405, April 24, 1995. . . . . 22, 26

Consideration of Reports submitted by states parties under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Session, 1413 mtg, par. 14 at 4, par 16 at 4, UN Doc. CCPR/C/79/Add. 50 (1995). 25

U.N. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, UN Doc. E/CN.4/1997/60 (1996). 18, 22

United Nations General Assembly, Note by the Secretary-General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, A/51/457 (1996). 18,22

Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1996/19, UN Doc. E/CN 15/1996/19 (1996). 21

UN Commission on Human Rights, , UN Doc. E/CN.4/1997/12, 3 April 1997. 22

United Nations Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/68, (1997). 18

UN Commission on Human Rights, , UN Doc. E/CN.4/1998/8, 3 April 1998. 22

UN Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, UN Doc. E/CN.4/1998/68/Add. 3 (1998). . . 23

UN Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Addendum, Mission to the United States of America, UN Doc. E/CN.4/1998/68 Add.3 (1998). 23

UN Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1999/39 (1999). 23-4

UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/1999/61, 23 April 1999. 22

European Union Demarche on the Death Penalty, forwarded to the United States with an EU Memorandum on the Death Penalty on February 25, 2000. 26

UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/2000/65, 27 April 2000. 22

ARTICLES, BOOKS AND OTHER SOURCES

AAMR Resolution on Mental Retardation and the Death Penalty, Board Book (1988) 16

American Bar Association, *Criminal Justice Mental Health Standards* (ABA 1987). 16

Amnesty International, *People's Republic of China, The Death Penalty in 1998* (January 9, 1999). 18

Amnesty International Website <http://www.amnesty.org/internal/death penalty/current information/abolitionist and retentionist countries> (visited January 9, 2001). 18

Arc of the United States, *Policy Statement*, 1992. 16

George Baroff, *Establishing mental retardation in capital cases: A potential matter of life and death.* Mental Retardation, 29(6) (1991) 8

George Baroff, *Why is Mental Retardation Mitigating?*, The Champion, Vol. XXII, No. 7 (1998) 8

J. Blume and D. Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Arkansas Law Review 731 (1988) 8

Marc J. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights*, 123 (1987) 25

Roger S. Clark, *Human Rights and the U.N. Committee on Crime Prevention and Control*, 506 Annals of the American Academy of Political and Social Science 68 (1989) 20

Stephen Davis, *The Death Penalty and Legal Reform in the PRC*, 1 Journal of Chinese Law 303, 307 (Fall 1987) . . . 18

R.B. Edgerton (1967) *The Cloak of Competence: Years Later*. American Journal of Mental Deficiency. 80 6

William Edwards, *Execution of People with Mental Retardation: A Violation of National and International*

Customary International Law, 38 Mental Retardation 173 (April 2000) 18

James W. Ellis, & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 George Washington Law Review 414 (1985) 7

S. Fulero, & C. Everington, *Assessing competency to waive Miranda rights in defendants with mental retardation.* Law and Human Behavior, 19(5) (1995) 6

G.H. Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony*.(1992) 6

G.H. Gudjonsson, *A new scale of interrogative suggestibility*. Personality and Individual Differences, 5 (1984) 6

G.H. Gudjonsson, *The relationship of intellectual skills to suggestibility, compliance, and acquiescence.* Personality and Individual Differences, 11 (1990) 6

Stanley S. Herr, Beyond Benevolence: Legal Protection for Persons with Special Needs, in *Mental Retardation in the Year 2000*, at 279, 289 (1992) 15

Stanley S. Herr, *Rights of Advocacy for Retarded People* 38 (1983) 23

L. Heal, & C. Sigelman, *Response Biases in Interviews of Individuals with Limited Mental Ability*. Journal of Intellectual Disability Research, 39(4) (1995) 6

Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 Florida State University Journal of Transnational Law and Policy 517 (1997) 18

S. Kassin, *The Psychology of Confession Evidence*. American Psychologist, 52(3) (1997) 7

Denis Keyes and William Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 Mental and Physical Disability Law Reporter 687 (1997)14

R.A. Leo & R.J. Ofshe, *The Consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation.* Journal of Criminal Law and Criminology (1997) 7

John Quigley, *Criminal Law and Human Rights:Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harvard Human Rights Journal 59 (1993). 25

Robert Perske, *Thoughts on the police interrogation of individuals with mental retardation*. Mental Retardation, 32(5) (1994). 6, 7

Emily Fabrycki Reed, *The Penry Penalty: Capital Punishment and Offenders with Mental Retardation*, 23, (1993). 10

Rosen, et al., *Investigating the Phenomenon of Acquiescence in the Handicapped: A Theoretical Model, Test Development and Normative Data*, 20 Brit. J. Mental Subnormality 58 (1974) 7

William Schabas, *The Abolition of the Death Penalty in International Law*, (2d ed. 1997). 24

William Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 Criminal Law Forum 95 (1993). 20

C.K. Sigelman, E.C. Budd, C.L. Spanhel, & C.J. Schoenrock, *When in doubt, say yes: Acquiescence in interviews with mentally retarded persons*, Mental Retardation, 19 (1981) . . 7

S. Simpson, *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose*, Capital Defense Digest, Vol. 6, No. 2 (1993) 7

Tsai Tun-Ming, *The Death Penalty in Taiwan and Mainland China: Should it be Abolished?*, 4 Journal of Chinese Law 173, 174 (Spring 1990). 18

United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2000*, at 392 24

James H. Wyman, *Vengeance is Whose? The Death Penalty and Cultural Relativism in International Law*, 6 Journal of Transnational Law and Policy 543 (1997).. 13

INTEREST OF *AMICI CURIAE*

The International Association for the Scientific Study of Intellectual Disabilities (IASSID) is the only world-wide scientific body for the study of intellectual disabilities. Given the inherent difficulties persons with intellectual disabilities, referred to in the United States as "mental retardation," face in the cognitive areas of communication, memory and moral reasoning, IASSID strongly opposes the execution of persons with an intellectual disability.

The Australian Association for the Scientific Study of Intellectual Disabilities (ASSID) is a scientific organization which brings together those working in the field of intellectual disability and promotes the study and understanding of intellectual disability through publications, conferences, national networks, symposia and other activities.

The Canadian Association for Community Living (CACL) supports people and families affected by intellectual disabilities and helps all Canadians to play a role in making their communities more inclusive.

The British Institute of Learning Disabilities (BILD), an independent registered charity in the United Kingdom, works to promote good practice in the provision and planning of health and social care services for persons with developmental disabilities and to promote an awareness of the issues which they face as a result of their disability.

The Bundesvereinigung Lebenshilfe is a national umbrella organization with 30,000 members in Germany, representing the interests of persons with intellectual disabilities and their families.

The Cristos Stelios Foundation (Cyprus, Greece) is an umbrella non-Governmental organization providing services to persons with disabilities throughout Cyprus.

The Community of Sant'egidio. is a lay Association recognized by the Catholic Church which works in more than 60 countries

to promote improvement in the conditions of life for persons facing the challenges of disabilities and poverty. The Community has been a candidate for the Nobel Prize for peace for several years and in 1998 won the Niwano Prize for peace in Japan.

European Academy of Childhood Disability (EACD) is a non-governmental organization which is a member of the European Disability Forum and focuses especially on issues of prevention, early intervention and habilitation of persons with developmental disabilities.

IHC New Zealand,Inc. was founded 50 years ago by parents of people with intellectual disabilities and continues today as a strong community-based service organization, advocating for the rights, inclusion and welfare of all people with intellectual disabilities.

Inclusion International, one of the largest international non-governmental organizations in the field of disability, Inclusion International, formerly known as The International League of Societies for Persons with Mental Handicap, unites close to 200 local and national member associations in 115 countries. The federation works closely with the United Nations and its agencies.

MENCAP: The Royal Society for Mentally Handicapped Children and Adults works with people with intellectual disabilities in England, Wales, and Northern Ireland, providing a broad spectrum of services and ensure recognition and respect for their rights as individuals.

P.O.S.G.A.M.E.A. is a non-profit Greek federation representing more than 140 associations of parents and guardians of mentally, autistic and multiple disabilities persons.

The National Association for the Mentally Handicapped of Ireland (NAMHI) is a national umbrella group of 160 organizations working in the field of intellectual disabilities.

SAMS: Standards & Monitoring Services Trust is a national organization which works to better the lives of people with intellectual disabilities in New Zealand and is an affiliate of Inclusion International.

The Society of Homes for the Handicapped, in keeping with its vision that the rights of persons with intellectual disabilities include, above all, the right to be recognised and respected and the right to receive whatever help is necessary in order to progress at every level, human and spiritual, works with families throughout Hong Kong, China, to provide quality service for their family members with disabilities.

Special Olympics, Inc. governs the worldwide Special Olympics movement, comprises over 200 accredited Special Olympics programs in 160 nations, all 50 States, and the District of Columbia, providing sports training and athletic competition to more than one million children and adults with mental retardation, thereby giving them the chance to develop physical fitness, demonstrate courage, experience joy, and share skills and friendship with their families, other Special Olympics athletes, and their communities.

The Swedish National Association for People with Mental Handicap, FUB (in Swedish), an organization of 31,000 members, safeguards the interests of persons with mental retardation in different sectors of society, offers support to its members and arranges activities, courses, and conferences.

TASH is an international advocacy association of people with disabilities, their family members, other advocates, and people who work in the disability field. TASH has chapters throughout the USA and Canada and members from thirty-eight countries around the world. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity and quality of life.

I. SUMMARY OF ARGUMENT *

This appeal arises from the decision of the United States Court of Appeals for the Fifth Circuit to deny Petitioner a Certificate of Appealability in this § 2254 capital habeas proceeding.[1] In denying petitioner's motion, the court relied on the rule for granting federal habeas relief in petitions filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) as stated in *Miller v. Johnson*, 200 F. 3d 274, 280-81 (5th Cir. 2000): that relief may be granted if the state court decision 'was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. That standard is met in this case where the state court unreasonably utilized the very same jury instructions in the retrial of petitioner as those found constitutionally infirm by this Court in his first trial, attempting to remedy the infirmity by adding an instruction that would require jury nullification in order to assess a sentence other than death, after finding petitioner guilty of capital murder. Petitioner's primary brief ably presents the Constitutional infirmities in these jury instructions and their adverse impact upon Petititioner. The international *Amici Curiae*, primarily disability organizations, who bring this brief for the Court's assistance in reviewing this matter, urge the Court to look beyond the narrow issue of the blatantly unconstitutional jury instructions and examine events of the past decade in the

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*Statement of Interest of *Amici Curiae* appears herein on page xvi.

[1]None of the parties or their counsel have contributed either monetarily or substantively to the preparation of this brief. Specifically, only the *Amici Curiae*, their members and their counsel have made substantive or monetary contributions to the preparation or submission of this brief. This *Amicus Curiae* brief is submitted in support of the Petitioner, Johnny Paul Penry. *Amici Curiae* Counsel have personally consulted Tommy Skaggs in the Texas Office of the Attorney General on behalf of the Respondent and Robert Smith on behalf of the Petitioner. There is no opposition to the filing of this *Amicus Curiae* brief.

light of the standard defined in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), hereinafter referred to as *Penry I*, for support of a ban on the execution of persons with mental retardation. Such an examination must lead to the determination that the time has now come for such a ban, as the only remedy that can correct, once and for all, the inherent flaws in the administration of the death penalty that lead to its cruel and disproportionate impact upon persons with mental retardation.

In 1972 this Court found the death sentence of William Henry Furman so harsh, freakish, and arbitrary that it halted executions nationwide. *Furman v. Georgia*, 408 U.S. 238 (1972). Like *Penry I*, Furman was a man encumbered with both poverty and mental retardation. Despite attempts by the states to comply with the Court's Order in *Furman* to remedy the arbitrariness of imposing the death penalty, the disproportionate application of that terrible weight continues to fall upon men with mental retardation and histories of deprivation and abuse.

Johnny Penry is a person with mental retardation. The disabilities that define and accompany mental retardation go to the heart of the meaning of "culpability" and "mens rea." Mental retardation corresponds directly to a defendant's capacity to understand and control his behavior; his ability to comprehend instructions, rules and warnings, included but not limited to *Fifth Amendment* warnings; his ability to participate meaningfully in his own defense; the appropriateness of a particular punishment for unacceptable or unlawful behavior, and the moral blame that should reasonably be attached to that behavior.

Here, we urge relief from a sentence of death imposed in a manner which violates the minimum constitutional standard set for jury instructions in the capital case of a person with mental retardation by this Court in the landmark case involving this very defendant. *Amici Curiae* agree with the arguments of Petitioner's counsel regarding the failure of the trial court to offer the jury in the penalty phase of his retrial a reasonable

opportunity to consider the mitigating effect of his mental retardation. We, however, focus upon issues central to the interest of the *Amici Curiae* that mandate a ban upon executing persons with mental retardation because all such executions are violations of the Eighth Amendment proscription against cruel and unusual punishment.

The moral standard for the imposition of any punishment, including and especially capital punishment, is that those who best understand the legal, ethical and moral rules of a society have the greatest responsibility to obey them and live within them. Yet 28 years after *Furman* and 11 years after *Penry I*, juries continue to assign the most severe penalty, and therefore the greatest culpability to those with substantially diminished cognitive ability, education and life experience. "It is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." (*Penry I*). "(F)ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character and crime." *Penry I*, quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988), quoting *California v. Brown*, 479 U.S.538, 545 (1987). There can be no genuine dispute that the nullification instruction given the jury in the Petitioner's retrial prevented that jury from giving a "reasoned moral response" to Petitioner's "background, character and crime."

Johnny Penry, a man compromised by a history of horrifying daily abuse beginning in infancy and with an IQ of 54, may have had some rudimentary sense that what he did was wrong; but what is the measure of his culpability? Sorting through the world's array of murderers, a rational positioning of Penry's culpability among his felonious peers would place him near the lowest in ability to plan, to form an intent. A

comparison of his capacity for cunning with others convicted of capital murder would find him among the lowest in cognitive rank. Yet Johnny Penry is a member of that minority of less than 1% of the individuals found guilty of capital murder who were sentenced to death. We would expect that small minority to be composed of the most culpable, most despicable, of felons. Instead we find many among them like Penry, persons with mental retardation, additionally scarred by the burdens of lifelong rejection, neglect and abuse. Their failures are not theirs alone; they are the failures of society. Johnny Paul Penry is an exemplar of that minority, a man the system of human services, and then the criminal justice system tragically failed. Justice Potter Stewart foreshadowed Penry's tragic fate in his opinion in *Furman*, when he wrote "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . [He is] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Furman v. Georgia 408 U.S. 238,309 (1972)

Amici Curiae urge this Court to address forcefully the issues raised in this case and act now so that the constitutional and just treatment this Court ordered the State of Texas to provide to the Petitioner in his retrial may at long last be accorded him.

II. ARGUMENT

A. ALL MENTAL RETARDATION IS A SEVERE COGNITIVE DISABILITY WHOSE ESSENTIAL NATURE IS DIRECTLY RELEVANT TO THE RELIABILITY OF A DEFENDANT'S CONFESSION, HIS ABILITY TO PARTICIPATE MEANINGFULLY IN HIS DEFENSE, THE DEGREE OF CULPABILITY FOR HIS

BEHAVIOR, AND THE SEVERITY OF PENALTY APPROPRIATE FOR HIS BEHAVIOR.

1. The impact of mental retardation upon a defendant's competence taints every aspect of a criminal prosecution from the time of arrest to the imposition of the penalty imposed upon him.

Defendants with mental retardation are "often unable to understand court proceedings, assist effectively in their own defense, or understand the significance of their punishment. Significant impairments in expressive language, reading, and understanding verbal information; short attention span; and deficits in working memory are among the problems they experience. Assessment tools to help determine whether they are competent to stand trial primarily assess court-related vocabulary and information which may be 'parroted' without full understanding. These tests do not assess the fluid cognitive abilities which enable a person to understand their legal defense options. This is especially relevant to important decisional parts of legal proceedings as pleading guilty or not guilty, plea bargaining, weighing outcomes and consequences, and strategies used in testimony and cross examination." *Report of the Criminal Justice Task Force*, State of California, 1998, provided to the library, United States Supreme Court.

These limitations assume great importance in capital cases, looming large in cases like Petitioner's where a psychologist with the Texas Department of Criminal Justice, noting that Penry had the second lowest IQ on death row, testified that there was "considerable doubt as to whether he would comprehend what is really going on at trial." 11 SR 795.

2. The presence of mental retardation is directly relevant to the reliability of defendant's confession.

From their first encounter with a police officer,[2] when they waive their *Fifth Amendment* rights against self-incrimination without understanding them,[3] to the final rap of the gavel as sentence is passed, the criminal justice system frequently fails persons with mental retardation who are accused of criminal conduct. Whether due to a naive tendency to provide more incriminating information about themselves than persons of normal intelligence, a greater suggestibility and vulnerability to the influence of authority figures and the pressures of interrogation, the desire to hide their disability to avoid the stigma attached to it, or an acquiescence rooted in social and cultural adaptation to their disabilities, it is well-documented that persons with mental retardation are more likely than those of normal intelligence to give unreliable, invalid confessions, frequently and alarmingly confessing to crimes they did not commit.[4]

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[2]*See Robert* Perske. *Thoughts on the police interrogation of individuals with mental retardation*. Mental Retardation, 32(5), 377-380 (1994).

[3]*See* S. Fulero. & C. Everington. *Assessing competency to waive Miranda rights in defendants with mental retardation*. Law and Human Behavior, 19(5), 533-543 (1995).

[4]See R.B. Edgerton, *The Cloak of Competence: Years Later*. American Journal of Mental Deficiency. 80, 485-497 (1967); G.H. Gudjonsson, *A new scale of interrogative suggestibility*. Personality and Individual Differences, 5, 303-314 (1984); G.H. Gudjonsson, *The relationship of intellectual skills to suggestibility, compliance, and acquiescence*. Personality and Individual Differences, 11, 227-231 (1990); G.H. Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony*. (1992); L. Heal, & C. Sigelman, *Response*

(continued...)

The vulnerability of people with mental retardation to the inherently coercive environment of police interrogation is particularly evident when they respond to "yes - no" questions. They often try to answer questions they do not understand, giving misleading and inaccurate information. This problem has been well-documented in scientific literature,[5] as well as in case law. In the case of *State v. Moore*, 364 S.E. 2d 648, 652-56 (1988) the North Carolina Supreme Court held that a series of "yes, sir" answers did not mean the same thing when spoken by a person with mental retardation as when spoken by a person of normal intelligence,[6] and in *Monroe v. United States*, 463 F.2d

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[4](...continued)
Biases in Interviews of Individuals with Limited Mental Ability. Journal of Intellectual Disability Research, 39(4), 331-340 (1995); R.A. Leo & R.J. Ofshe, *The Consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation*. Journal of Criminal Law and Criminology (1997); S. Kassin, *The Psychology of Confession Evidence*. American Psychologist, 52(3), 221-233 (1997); C.K. Sigelman, E.C. Budd, C.L. Spanhel & C.J. Schoenrock, *When in doubt, say yes: Acquiescence in interviews with mentally retarded persons*, Mental Retardation, 19, 53-58 (1981); Robert Perske, *Thoughts on the police interrogation of individuals with mental retardation*. Mental Retardation, 32(5), 377-380 (1994). *See also Sims v. Georgia*, 389 U.S. 404 (1967); *Reck v. Pate*, 367 U.S. 433 (1961); and *Culombe v. Connecticut*, 367 U.S. 568 (1961) (mental retardation a significant factor in finding a confession was involuntary and unreliable).

[5]*See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 George Washington Law Review 414, 425-428 (1985); Rosen, et al., *Investigating the Phenomenon of Acquiescence in the Handicapped: A Theoretical Model, Test Development and Normative Data*, 20 Brit. J. Mental Subnormality 58, 58-68 (1974); and S. Simpson, *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose*, Capital Defense Digest, Vol. 6, No. 2, p. 30 (1993).

[6]*See also State v. Ives*, 648 A.2d 129, 133 (Vt. 1994); *Yeatts v.*

(continued...)

1032 (5th Cir. 1972), responses of this type were found insufficient to constitute a valid waiver of rights even when the defendant's attorney was present.

3. Mental retardation diminishes the degree of culpability for criminal behavior.

In no case does an individual with mental retardation have that minimal level of cognitive functioning necessary for logical and moral reasoning sufficient to satisfy the requirements of the Eighth Amendment in capital cases. Although an offender with mental retardation may be aware that his behavior is unlawful, his knowledge and awareness of the degree of wrongfulness in his acts is less than that of a person of normal intelligence. Research shows, for example, that though these defendants may acknowledge that killing or other crimes are wrong, they have great difficulty in explaining *why* they are wrong. Dr. George Baroff relates the attempted explanation by a defendant with mental retardation who, while acknowledging from the witness stand that the rape of an 87-year old woman was "wrong," could not explain why. Pressed for an explanation, he admitted that he had not received "permission." Pressed further, he blurted out, "Maybe it's against her religion!" George Baroff, *Why is Mental Retardation Mitigating?*, The Champion, Vol. XXII, No. 7, 33-35 (1998).[7] This transparent lack of understanding of the nature of criminality illustrates the impairments inherent in the very definition of mental retardation that relate directly to culpability.

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[6](...continued)
Commonwealth, 242 Va. 121, 410 S.E.2d 254, 259 (1991).

[7]*See also* George Baroff, *Establishing mental retardation in capital cases: A potential matter of life and death.* Mental Retardation, 29(6), 343-349 (1991); J. Blume and D. Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Arkansas Law Review 731 (1988).

4. The reduced culpability of the offender with mental retardation requires that the penalty for his acts must be less than that of a person with normal intelligence.

People with mental retardation should not be exempt from prosecution, nor should their disability be considered as a reason or excuse for criminal behavior, but the cognitive limitations which necessarily reduce their culpability require that the penalties imposed be *proportionate* in order that justice be served. The construct of culpability has a direct relationship to cognitive ability. In no case is the death penalty a proportionate punishment for a person with mental retardation. As Justice Brennan's *Penry I* dissent reasoned,

> The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional." *Penry I*, 492 U.S. at 346

Since this Court's findings in *Furman*, it has been clear that the death penalty is to be reserved for the most culpable of all those convicted of capital crimes. *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 295-296 & fn. 31 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 427, 433 (1980); *Lowenfield v. Phelps*, 484 U.S. 231 (1988). To avoid the constitutional flaws identified in *Furman*, the states "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Selection of individuals to receive the penalty is, therefore, not to be based only upon the nature of the offense, but also upon the culpability of the offender. Less than 1% of those convicted of capital crimes are sentenced to death. It defies logic that

individuals like Johnny Paul Penry, who fall into the bottom 2% of the population in cognitive abilities, in their ability to reason and plan, deserve to receive the punishment reserved for the most culpable persons elected to that minority of less than 1% who receive the harshest punishment meted out in our criminal justice system. *See* Emily Fabrycki Reed, *The Penry Penalty: Capital Punishment and Offenders with Mental Retardation*, 23 *(1993)*.

5. The societal advances that have led to greater integration of and achievements by individuals with mental retardation in their communities do not alter their cognitive disability and decreased culpability.

Over the last four decades, the efforts of the *Amici Curiae* and similar non-governmental organizations, as well as the federal and state governments, have allowed individuals with mental retardation to make enormous strides. Many, perhaps most, of the institutions in which such persons were often confined have been closed, and persons with these intellectual disabilities now live on their own in residential group homes or completely independently, hold meaningful jobs, and excel in Olympic-type sports. This Court has contributed significantly to this progress. *Olmstead* v. *L.C.*, 527 U.S. 581 (1999). These many accomplishments deserve recognition and applause by society. But no matter how impressive such progress, mental retardation has not been eliminated and cannot be cured, nor can such progress change the fact that these persons have serious cognitive disabilities and substantially diminished capacity for culpability. Justice Brennan recognized this distinction in his dissent in *Penry I*: "Though individuals, particularly those who are mildly retarded, may be quite capable of overcoming these limitations to the extent of being able to 'maintain [492 U.S. 302, 346] themselves independently or semi-independently in the community,'... nevertheless, the mentally retarded by definition

have a reduced ability to cope with and function in the everyday world."

It would be a tragic irony if four decades of social progress by people with mental retardation were used to justify their continued subjection to execution for crimes for which they do not have the minimum level of culpability almost every civilized society requires before imposing the death penalty.

B. JOHNNY PAUL PENRY'S SENTENCE OF DEATH VIOLATES THE UNITED STATES CONSTITUTION'S GUARANTEE OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT.

1. The execution of a person with mental retardation is proscribed by the Eighth Amendment as "cruel and unusual punishment" in light of the societal consensus that has evolved since this Court's opinion in this case.

More than 90 years ago, this Court recognized that the constitutional prohibition against cruel and unusual punishments is not a rigid rule, fossilized in its meaning. It "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States* 217 U.S. 349, 378 (1910). In *Penry I*, this Court again acknowledged the role of societal consensus in determining whether or not a particular criminal penalty is "cruel and unusual." The Court cited *Ford v. Wainwright*, 477 U.S. at 408 (1986) as a case in which the standard was met and possibly exceeded in cases of insanity; but found that the required level of societal consensus had not yet been met in cases of mental retardation. At that time only two states had banned the execution of persons with mental retardation, and the majority of the Court was not persuaded by the opinion polls and resolutions by public interest organizations presented as evidence of such a consensus. The Court noted:

> The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment. *Penry I*, at 335.

Even at that time, however, four Supreme Court Justices thought a societal consensus already supported a ban on executing persons with mental retardation. Since then, lower courts have also acknowledged the significance of a societal consensus in analyzing Eighth Amendment challenges to the execution of persons with mental retardation (*See* e.g., *Andrews v. Collins*, 21 F.3d 612, 632(5th Cir. 1994). The *Andrews* court found insufficient evidence at that time of a national consensus to override this Court's determination in *Penry I*, citing only three states that had prohibited such executions since this Court's opinion in 1989. Since that time the situation has changed dramatically.

2. "Evolving standards of decency," which give context and meaning to the Cruel and Unusual Punishment Clause under the Eighth Amendment, must reflect both domestic and international standards and must acknowledge the recent international consensus condemning the execution of people with mental retardation.

Since the decision by this Court more than a decade ago in *Penry I*, public sentiment has shifted sharply against continued use of the death penalty for people with mental retardation. The evolving standards of decency that invoke the Eighth Amendment's protection should reflect not only a consensus of opinion in United States jurisdictions but the testimony of the global community. By the standards of both the domestic and the international communities, the execution of people with mental

retardation must now be viewed as a constitutionally forbidden cruel and unusual punishment.

a. The Eighth Amendment standard of decency has evolved significantly in domestic law since the decision by this Court in *Penry I*.

This Court has frequently referred[8] to the "evolving standards of decency that mark the progress of a maturing society" in gauging the application of the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). When determining whether a punishment is incompatible with evolving standards of decency, the Court has looked first and primarily to "objective indicia that reflect the public attitude toward a given sanction." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell and Stevens, JJ.) The most important "objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry I*, 492 U.S. at 331; *Stanford v. Kentucky*, 492 U.S. 361, 367-70 (1989). Where state legislatures have reached a sufficient "degree of national consensus" in rejecting a particular punishment, *id.* at 370-371, that punishment is unconstitutional. It is clear that at some point the state legislative trend will become so compelling that it cannot be ignored. *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977); see also *Thompson v. Oklahoma*, 487 U.S. 815, 828-29 (1988).

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[8] There have been at least 37 Supreme Court cases, most of which deal with the death penalty but all of which concern the cruel and unusual punishment clause of the Eighth Amendment, which use the phrase "evolving standards of decency that mark the progress of a maturing society." James H. Wyman, *Vengeance is Whose? The Death Penalty and Cultural Relativism in International Law*, 6 Journal of Transnational Law and Policy 543, 553, n.81 (1997).

In the 12 years since this Court's decision in *Penry I*, a "national consensus" has emerged. When the Court decided *Penry I* in 1989, only two states - Georgia and Maryland - had legislation explicitly prohibiting the execution of people with mental retardation. Since that time the situation has changed dramatically. Currently, the federal government and 13 states have passed legislation[9] prohibiting the execution of people with mental retardation. Denis Keyes and William Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 Mental and Physical Disability Law Reporter 687, 689 - 690 (1997). Of the 52 jurisdictions of the United States with the potential to impose the death penalty (the 50 states plus the District of Columbia and the federal government), 12 states and the District of Columbia ban capital punishment altogether. Thus, 25 states, plus the federal government and the District of Columbia, or 27 of the 52 possible jurisdictions - more than half - presently ban the execution of people with mental retardation. The actions of these numerous state legislatures and Congress amount to a strong "objective indicator of contemporary values" (*Penry I*, at 335) that reflects a growing national opposition to the execution of people with mental retardation.

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[9] Federal Anti-Drug Abuse Act of 1988, Pub.L. 100-690, §7001(l), 102 Stat. 4390, 21 U.S.C. §848(l) (1988 ed.); Violent Crime Control and Law Enforcement Act of 1994 18 U.S.C. §3596(c) (1994); Ark. Code Ann. §§ 5-4-618(b) (1999); Colo. Rev. Stat. §§16-9-403 (West 2000); Ga. Code Ann. §§17-7-131(j) (2000); Ind. Code Ann. §§35-36-9-6 (West 2000); Kan. Stat. Ann. §§ 21-4623 (d) (1999); Ky. Rev. Stat. Ann. §§ 532.140 (Michie 1990); Md. Code Ann. Art. 27 §§412(g)(1)(Bender 2000); Neb. Rev. Stat. §§28-105.01(2) (2000); N.M. Stat. Ann. §§31-20A-2.1(B) (Bender 2000); N.Y. Crim. Proc. Law §§400.27(12) (West 2000); S.D. Session Law 2000, Ch. 112 (S.D.C.L. §23A-27A-2000); Tenn. Code Ann. §§39-13-203(b) (1999); Wash.Rev. Code Ann. §§10.95.040(2) (West 2000).

Even absent clear statutory mandates, courts have overturned or modified death sentences because the defendant has mental retardation.[10] Opinion polls throughout the nation continue to show that the American people are strongly opposed to executing persons with mental retardation,[11] even in states where the death penalty has the greatest public support. "Consistent opinion polling data," Dr. Stanley Herr reports, show that "Americans (even in those states that have the highest rates of execution) do not believe offenders with mental retardation should be subject to the death penalty."[12]

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[10] *See, e.g., Hadley v. Alabama*, 575 So.2d 145 (Ala.Crim. App. 1990); *Arizona v. Jimenez*, 799 P.2d 785 (Ariz. 1990); *Brown v. Florida*, 526 So.2d 903 (Fla. 1988), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371 (1988).

[11] *See* Denis Keyes & William Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, American Bar Association (1997), in which the authors report the results of state polls in Arkansas, California, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Nebraska, New York, Oklahoma, South Carolina, and Texas demonstrating a majority of the citizenry opposes execution of persons with mental retardation. The Texas poll which showed 86% of Texans support the death penalty, also showed that 73% oppose its imposition upon persons with mental retardation. This poll was influential in persuading the Texas legislature to begin work on a state statute (SB326) banning the death penalty for mentally retarded offenders. News Release of State Senator Rodney Ellis, May 18, 1999.

[12] Stanley S. Herr, Beyond Benevolence: Legal Protection

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In 1989 and 1997, the American Bar Association adopted a policy opposing the execution of people with mental retardation. The American Bar Association's *Criminal Justice Mental Health Standards* published in 1987, also opposes the execution of people with mental retardation and mental illness. The American Association on Mental Retardation, the oldest and largest professional organization in the field, has opposed the execution of people with mental retardation since at least 1988, *AAMR Resolution on Mental Retardation and the Death Penalty*, Board Book, at 14 (1988). In 1992, the Arc of the United States also published a policy statement on exempting people with mental retardation from the death penalty. This policy statement provides that the "presence of mental retardation by definition raises so many possibilities of miscommunication, misinformation, and inadequate defense that the imposition of the death penalty creates an unacceptable risk of a miscarriage of justice." These positions are mirror reflections of ones adopted by every other organization that has joined in this brief as an *Amicus Curiae*.

b. The evolving standard of decency defining cruel and unusual punishment must be informed by international human rights norms and actions which demonstrate a virtual unanimity in the world community against the imposition of the death penalty upon people with mental retardation.

The Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . ." against which we evaluate penal measures. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)(quoting *Jackson v. Bishop*, 404 F. 2d 571, 579 (8th Cir. 1968)(Blackmun, J.)). The "civilized

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[12](...continued)
for Persons with Special Needs, in *Mental Retardation in the Year 2000*, at 279, 289 (1992).

standards" of a mature society referred to in *Estelle* can be discerned only by reference to the practices of the world community in which the United States is so important a member and participant. The customs and practices of civilized nations, as well as expressed international human rights norms, all make up the relevant "civilized standards." *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *The Paquete Habana*, 175 U.S. 677, 700 (1900). As Justice Scalia noted in this Court's judgment in *Stanford v. Kentucky*, 492 U.S. 361, 371, n.1 (1989), "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-869 (1988). While Justice Scalia suggests an Eighth Amendment prerequisite of acceptance "among our people," (Ibid), the strong shifts in state legislative and bar association action, combined with public opinion polls, demonstrate that "our people" no longer accept the death penalty for persons with mental retardation. Foreign and international practice and standards, moreover, are certainly relevant to the determination of the "civilized practices" required by the Eighth Amendment.

In addition to the growing national consensus in the United States, the general practices, customs and developments in the international community and in other countries since this Court decided *Penry I*, show overwhelming evidence of worldwide repudiation of capital punishment for people with mental retardation. The United States is one of only two countries that practice the execution of people with mental retardation. Presently, at least 108 countries prohibit by law or in practice the execution of people with mental retardation. William Edwards, *Execution of People with Mental Retardation:*

A Violation of National and International Customary International Law, 38 Mental Retardation 173, 175 (April 2000); see also, Amnesty International Website <http://www.amnesty.org/internal/death penalty/current information/abolitionist and retentionist countries> (visited January 9, 2001). Of those countries that still retain and employ the death penalty, almost none execute people with mental retardation, having simply abandoned the practice. For example, China carried out 1,769 confirmed executions in 1998 alone, three times as many as the rest of the world, yet the execution of people with mental retardation is banned, as it has been since Imperial times. See Amnesty International, *People's Republic of China, The Death Penalty in 1998*,1 (January 9, 1999); Stephen Davis, *The Death Penalty and Legal Reform in the PRC*, 1 Journal of Chinese Law 303, 307 (Fall 1987); and Tsai Tun-Ming, *The Death Penalty in Taiwan and Mainland China: Should it be Abolished*? 4 Journal of Chinese Law 173, 174 (Spring 1990).

As of 1997, no country other than the United States and Kyrgyzstan executes people with mental retardation. See Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 Florida State University Journal of Transnational Law and Policy 517, 533 (1997); Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, UN Doc. E/CN.15/1996/19 (1996) paragraph 74; United Nations Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1997/60 (1996) paragraphs 89, 90. Manifestly, an overwhelming international consensus on this subject now exists.

Penry I recoiled at the prospect of giving the states an unrestricted license to execute people with mental retardation: the Court acknowledged that the use of the death penalty in cases

of profound or severe mental retardation might amount to cruel and unusual punishment. *Penry I's* specific holding can be reconciled with that acknowledgment in only one of two ways: either by drawing the constitutional line explicitly in terms of degrees of mental retardation (which would present difficult practical problems) or by attempting to assimilate profound or severe mental retardation into the concept of "insanity." Significantly, neither of these ways of preserving *Penry I's* reading of the application of "evolving standards of decency" to the question of executing people with mental retardation has commended itself to the American States or to the international community in the decade since *Penry I*. To the contrary, both within the United States and globally, the unmistakable movement has been to add a prohibition against the execution of people with mental retardation to the preexisting prohibition against executing the insane, and to make the category include all people with mental retardation, not just people who are profoundly retarded.

c. Since *Penry I*, global human rights instruments, organizations and officials have increasingly called for limitation and eventual abolition of the death penalty for people with mental retardation.

The actions of the international community, and particularly of the organs charged with attending to human rights within the United Nations, can provide illuminating guidance in this Court's efforts to identify evolving standards of decency.

As early as 1971, the United Nations General Assembly adopted the Declaration on Rights of Mentally Retarded Persons. G.A. Res. 2856 (XXVI), UN Doc. A/8429 (1971). The Declaration states, in Article 6, that if a person with mental retardation is prosecuted for any offense, "he shall have the right to due process of law with full recognition being given to his degree of mental responsibility." Further, under article 7, procedures which restrict the rights of the mentally retarded

"must contain proper legal safeguards against every form of abuse."

In the 1980s, the organs of the United Nations drafted safeguards concerning the implementation of the death penalty. William Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 Criminal Law Forum 95, 103 (1993). In March 1984, the United Nations Committee on Crime Prevention and Control[13] proposed a set of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. The safeguards call for the prohibition of the execution of "persons who have become insane." Draft Resolution VII, in Report of the Committee on Crime Prevention and Control on its Eighth Session, UN ESCOR, 8th Session, Supp. No. 6, at 19, UN Doc. E/AC.57/1984/18(1984); See also Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1984/50, UN ESCOR, Supp. No. 1, at 33, UN Doc. E/1984/92 (1984). The Safeguards were subsequently endorsed by the United Nations General Assembly. United Nations General Assembly, Human Rights in the Administration of Justice, G.A. Res. 39/118, UN Doc. A/RES/39/118, 14 December 1984.

In 1988, the United Nations Committee on Crime Prevention and Control shifted its focus from prohibiting the execution of the insane - which had been accomplished throughout the world on a *de facto* basis - and brought its

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[13] This committee was an expert body tracing its origins to the International Penal and Penitentiary Commission, which in turn dated to the late nineteenth century. The committee was replaced in 1992 by the Commission on Crime Prevention and Criminal Justice, which reports to the Economic and Social Council (ECOSOC). See Roger S. Clark, *Human Rights and the U.N. Committee on Crime Prevention and Control*, 506 Annals of the American Academy of Political and Social Science 68, 69-70 (1989).

attention to bear on restraining the execution of people with mental retardation. The Committee's final resolution was adopted in 1989 by the United Nations Economic and Social Council. The Council recommended that all nations take steps to strengthen the protection of the rights of those facing the death penalty, including "[e]liminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res.1989/64, UN ESCOR, 1989, Supp. No. 1, paragraph 1(d), at 51, UN Doc. E/1989/91 (1989) (adopted without a vote). In 1995 the United Nations Human Rights Committee again called for the implementation of safeguards because "there appears to have been lack of protection from the death penalty of those mentally retarded." Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1996/19, UN Doc. E/CN 15/1996/19 (1996).

The United Nations Commission on Human Rights is the leading inter-governmental body dealing with human rights issues within the United Nations. Government representatives sit on the Commission, which has varied in size. Since 1997, the United Nations Commission on Human Rights has passed resolutions on the death penalty, calling on those countries that maintain the death penalty to limit the penalty to the most serious crimes, and to impose the penalty only in compliance with treaty obligations, especially those of the International Covenant on Civil and Political Rights. UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/1997/12, 3 April 1997; UN Doc. E/CN.4/1998/8, 3 April 1998.

In 1999, the Commission on Human Rights passed a resolution calling upon the states which maintain capital punishment "[n]ot to impose the death penalty on a person

suffering from any form of mental disorder or to execute any such person." UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/1999/61, 23 April 1999, paragraph 3(e). Again in 2000, the Commission reiterated its position on the execution of any person with a mental disorder. UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/2000/65, 27 April 2000, paragraph 3(e).

The U.N. Commission on Human Rights also appointed an expert to keep apprized of worldwide developments concerning capital punishment, with the specific charge to report back to the Commission on his or her findings. Since 1992, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution has consistently condemned the execution of people with mental retardation, with particular criticism of this practice by the United States. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1992/30, at paragraphs 577-578. See also, UN Doc. E/CN.4/1993/46, paragraphs 629-630, 679; UN Doc. E/CN.4/1994/7, paragraphs 620, 686-687;UN Doc. E/CN.4/1995/61, paragraphs 325, 330, 373; U.N. General Assembly, Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/51/457, 7 October 1996 (reports of the execution of people with mental retardation were noted only in the United States and Kyrgyzstan. Paragraph 116); UN Doc. E/CN.4/1998/68, (after repetition of the admonition, calling on states that continue to enforce legislation permitting the execution of the mentally ill and mentally retarded to "consider the adoption of special laws to protect the mentally retarded, incorporating existing international standards."(Section VI, Recommendation 1).

In 1998, after a special mission to the United States, the Special Rapporteur submitted a report to the United Nations Commission on Human Rights which criticized the United States for executing people with mental retardation "in contravention of relevant international standards." United Nations, Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Addendum, Mission to the United States of America, UN Doc. E/CN.4/1998/68 Add.3 (1998) paragraphs 11-14, 36, 145-146 and 156. In 1999, another report of the Special Rapporteur was submitted to the United Nations Commission on Human Rights. This report relates to the monitoring of existing international standards on safeguards and restrictions governing capital punishment. The Special Rapporteur recommended that "governments that continue to enforce death penalties are urged to take immediate steps to bring their domestic legislation and practices into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons[14]." United Nations, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN/.4/1999/39 (1999) paragraph 82.

The International Covenant on Civil and Political Rights (ICCPR) is another human rights instrument which

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[14] The word "handicapped" in this context refers to persons with a mental handicap, a synonym for mental retardation. United Nations, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN/.4/1999/39 (1999) paragraph 62. See also Stanley S. Herr, *Rights and Advocacy for Retarded People* 38 (1983). The many international disability organizations who have joined in this brief as *Amici Curiae* use different terms for mental retardation. For example England uses the term "learning disability." Canada uses the word "intellectual disability," Greece uses the term "persons with disabilities" and Ireland uses the word "mentally handicapped."

contemplates the exclusion of people with mental retardation from the death penalty. GA Res. 2200 A(XXI), U.N. G.A.OR, UN Doc. A/6316 (1966). The United States ratified the ICCPR in 1992. United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2000*, at 392 (entered into force for the United States on September 8, 1992).

While the ICCPR does not expressly prohibit the imposition of the death penalty on people with mental retardation, Article 7 states that "[no] one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 6(1) of the ICCPR expressly prohibits the "arbitrary" taking of life. Various sources assist in the interpretation of the word "arbitrary", including the *travaux preparatoires*, or drafting history of the treaty. "Arbitrary[15] is defined by the drafting history to mean, *inter alia*, "without adequate determining principle; . . . not governed by any fixed rule or standard." Marc J. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights*, 123 (1987). The deprivation of life is "arbitrary" if it is "made without due regard to the rules of natural justice and due process and made in a manner contrary or in conflict with international human rights standards or international humanitarian law." William Schabas, *The Abolition of the Death Penalty in International Law* 100 (2d ed. 1997). Thus, the observation has been made that "where the condemned person is

[15] A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." See, e.g., American Convention on Human Rights, which the United States has signed. 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1, art. 4, 1969, entered into force July 19, 1978; African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3/rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4.

seriously lacking in understanding, the taking of life might be considered arbitrary." John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harvard Human Rights Journal 59, 75 (1993).

In 1995 the United Nations Human Rights Committee in commenting on the United States Report on compliance with ICCPR, expressed its "regret" that the United States continues to execute people with mental retardation. United Nations, Consideration of Reports submitted by states parties under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Session, 1413 mtg, par. 14 at 4, par 16 at 4, UN Doc. CCPR/C/79/Add. 50 (1995). As of January 5, 2001, 147 states, including the United States are parties to the International Covenant on Civil and Political Rights, making it one of the most universally ratified statements of global human rights norms. (See United Nation Treaty Collection, on Internet at <http://untreaty.un.org.> (visited January 5, 2001).) The United States should interpret its own constitutional provisions - here, the Eighth Amendment provision barring cruel and unusual punishment - in a manner which is consistent with its international treaty obligations.

Many other human rights organizations such as the Organization for Security and Co-operation in Europe[16] and the European Union have voiced their strong opposition to the

[16] Organization on Security and Co-operation in Europe, Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, 5 June - 29 July, 1990. Article 17.3 states that the "participating States" (which include the U.S.) "note the restrictions and safeguards regarding the use of the death penalty which have been adopted by the international community, in particular Article 6 of the International Covenant on Civil and Political Rights."

execution of people with mental retardation. In 2000, the European Union expressed its concern, via a demarche, that the United States continues to carry out the death penalty against those who suffer from mental disorder. European Union Demarche on the Death Penalty, forwarded to the United States with an European Union Memorandum on the Death Penalty on February 25, 2000.

Taken together, the evidence of near-universal abhorrence of the death penalty for people with mental retardation is overwhelming. State practice has virtually eliminated such executions, with the conspicuous exception of the United States. Global and regional bodies and experts have expressed consistent and increasingly trenchant opposition to the execution of people with mental retardation. International disability organizations from around the globe dedicated to the promotion of human rights have insisted upon strict limitation of the death penalty, including its total elimination for people with mental retardation.

Disability organizations in the United States and throughout the world have the greatest familiarity with people with mental retardation, as well as an institutional history of understanding their needs and limitations. These organizations have condemned the practice of executing people with mental retardation through such steps as policies and resolutions[17]. Today they reinforce their condemnation of this barbaric practice through their participation as *Amici Curiae*.

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[17] For example, in 1999 the Canadian Association for Community Living passed a Resolution joining Inclusion International and others to urge United Nations members to oppose the execution of people with mental retardation (Resolution 4/99, 1999).

III. CONCLUSION

In one of his last official acts as a Supreme Court Justice, *Callins v. Collins* (1994), Justice Blackmun wrote: *"From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor."* To ensure fairness for those with mental retardation who stand convicted of capital crimes, this Court no longer should "tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1143 (1994). Like Justice Blackmun, many other Justices of this Court, as well as state court judges and legislators have struggled for decades to excise the sickness of disproportionality that infects the penalty like a cancer, seeming at once to have been removed by a skillful surgeon's hand, only to reappear elsewhere in the body of justice, continuing to effect its cruelty upon that class of persons the surgery was intended to help.

For example, the Court's effort to rehabilitate the death penalty through its order in *Furman v. Georgia* was a response to the appeal of William Henry Furman (*Furman v. Georgia*), a person with mental retardation whose death penalty conviction arose from his shooting through a door, not even knowing that a person stood on the other side. The Court tried again in *Penry I* to ensure fair treatment of persons with mental retardation, ruling that juries must have a reasonable opportunity to consider a defendant's mental retardation when deciding upon the penalty. The response of the State of Texas and the outcome of Penry's second trial demonstrate all too clearly how that attempt has failed another person with mental retardation.

It may well be that the system's failure is not that of government, but the failure of a society with deep historical roots of devaluing the lives of persons with mental retardation. The

enormous progress made in recent years to effect the acceptance and integration into the general community of persons with mental retardation may obscure a reservoir of prejudice and misunderstanding toward them that finds its expression in the decisions of juries that a capital defendant with mental retardation is a more likely target for death than a capital defendant of normal intelligence. We urge this Court to no longer tinker with the machinery of death where its targets are persons with mental retardation, but to acknowledge the decades of discrimination and injustice visited upon them by social perceptions of their disabilities and their worth as human beings by granting the only remedy for the constitutional infirmity that this history has wrought by reflecting the global consensus and ending the practice of executing persons with mental retardation.

Respectfully submitted,

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